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DISTRICT COURT - SRBA
Fifth Judicial District
County of Twin Falls - State of Idaho

NOV 26 2010

Deputy

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA

Case No. 39576

Subcase Nos: 34-2459, 34-2460, 34-2461,
34-2462, and 34-10925

**REPLY MEMORANDUM IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT**

Isom Acres Limited Partnership, Charles Isom, and Don Isom (collectively, "Isom"), by and through their counsel of record, Robert L. Harris of Holden, Kidwell, Hahn & Crapo, PLLC, hereby submit this *Reply Memorandum in Support of Motion for Summary Judgment*. This memorandum is in reply to *Objector's Response to Claimant's Motion for Summary Judgment* (hereinafter, "Objector's Response").

This memorandum is supported by the *Second Harris Affidavit* previously submitted in this matter, and the additional *Third Affidavit of Attorney Robert L. Harris* submitted herewith. This motion is also supported by the documents attached to the *Affidavit of Paul L. Arrington* recently submitted.

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Lastly, we should note for the court BLRID and Isom have reached an agreement to resolve BLRID's concerns in this matter, and therefore, no reply has been made by BLRID relative to the arguments previously made as to their objections. Therefore, this reply only addresses arguments made by Doug Schureman, Jim Huelsman, and Tyler Felton (collectively, "Schureman"), by and through their counsel of record, Paul L. Arrington of Barker, Rosholt & Simpson, LLP, in their Reply Memorandum.

As set forth below, the documents attached to the Arrington Affidavit, particularly those transport agreements that specifically reference 1000 inches (20 cfs) of "well water" or "pump water," provide additional support for the Department's *Amended Director's Report* finding that the Island Wells should be added as authorized points of diversion for the above water rights pursuant to an accomplished transfer. For the reasons set forth below, based upon all the evidence submitted, the objections filed by BLIRD and Schureman fail as a matter of law, and summary judgment in Isom's favor should be granted.

I. INTRODUCTION AND BACKGROUND

As contained in Isom's *Memorandum in Support of Motion for Summary Judgment*, this matter concerns the adjudication of the above subcases that were initially claimed by Willard Bell, a predecessor-in-interest to Isom, in the late 1980s.

On October 30, 1990, amended claims were filed by Willard Bell of Crater Farms, Inc. Importantly, the amended claim contained two maps: one map of the water right place of use (near the Arco Airport) and three claimed points of diversion (the Airport Wells), and the second map depicting the location of the Island Wells. This second map depicting the Island wells was not included in the original claim filed by Mr. Bell. *Second Harris Affidavit* at Exhibit A.

Further, in the claim document itself, at item 14 (the "Remarks Section"), it states the following

"Rediversion from Munsey Ditch: NW SE SE, (2 points), Section 2; SW SW NW, (2 points) Section 13,, SE SE NE Section 15; SE NE NE Section 22; SE NW SW Section 23; Township 3 North, Range 26 East."

Second Harris Affidavit at Exhibit A. The submission of this second map and the statement in the remarks section indicates that Mr. Bell claimed the Island Wells as authorized points of diversion under the water rights. This is because water from the Airport Wells does not enter the Munsey Ditch, but instead, water diverted from the Airport Wells is entirely contained within a private delivery system. To provide some clarity, see the zoomed in GIS map attached as Exhibit A to the *Third Harris Affidavit*. The private ditch runs southwest from the Airport Wells, under Highway 93, under the Airport, and then to the Isom authorized place of use. Only water diverted by the Island Wells enters the Munsey system, and it is rediverted from the Munsey Ditch at various locations along the Munsey in Township 3N, Range 26E.

As previously explained to this court, for reasons not evident in the file, the legal descriptions for the Island Wells were not included on the first page of the amended claim (where the legal written legal descriptions are to be listed) as they apparently should have been based upon the included maps that were attached to the amended claims. These maps, along with the description of the rediversion points in the Munsey Canal, demonstrate that Mr. Bell intended to claim the Island Wells as points of diversion for the above subcases.

The historic practice has been such that when the Airport wells are not producing sufficient amounts of water, the entirety of the Isom rights were diverted from the Island Wells. This practice was undertaken previous to 1987, and therefore, qualified the water rights at issue for an

accomplished transfer. Additionally, even under the prior incorrect partial decrees, all of the above-referenced water rights shared a common place of use of 1980 acres, and further, shared a combined annual diversion volume limitation of 8441.5 acre-feet. It follows that the rights should likewise all share the same points of diversion and combined diversion rate.

Based upon this information, this court set aside the prior partial decrees, and after further review and injury analysis, IDWR issued *Amended Director's Reports* on December 8, 2009 for the above subcases, which changed the partial decrees to allow for the interchanged use of the Airport and Island Wells. However, the amended partial decrees also contained additional conditions and/or clarifying language limiting volumes diverted pursuant to various rights, and importantly included the following remark to protect against injury to other water rights:

Pursuant to a call, in times of scarcity, the diversion of water under this right from the two wells in T05N R26E S34 SENWSW and T04N R25E S3 NESENW has a priority date of May 18, 1982.

Second Harris Affidavit at Exhibit E. Therefore, to extent a delivery call is filed, existing water rights are protected pursuant to this condition, including water rights owned by Schureman. Based upon Isom's counsel's review of all of the Objectors' ground water rights contained on IDWR's website, **they are all senior to the May 18, 1982 subordination.**

After the *Amended Director's Report* was issued, objections were filed by Schureman, alleging that the diversion rate was inaccurate, that the acre-feet limitation of 8441.5 acre-feet was unjustified, and should be limited to 6930 acre-feet, and that IDWR should perform an "injury analysis" as to inclusion of the Island Wells in the above subcases. Schureman's position on these issues was elaborated in their *Objector's Response to Claimant's Motion for Summary Judgment*, and purportedly supported by additional documentation provided by Schureman. As explained below, the documentation provided by Schureman actually lends further support to the Department's

Amended Director's Report adding the Island Wells and authorized points of diversion. For the reasons set forth below, Isom is entitled to summary judgment.

II. ARGUMENT.

A. Summary Judgment Standard.

Summary judgment is appropriate when "the pleadings, depositions and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."¹ When a jury trial has been demanded, disputed facts are to be construed in favor of the non-moving party, and all reasonable inferences that can be drawn from the record are drawn in favor of the non-moving party. Without a demand for a jury trial, however, the court may construe facts differently:

[I]f an action will be tried before the court without a jury, the judge is not constrained to draw inferences in favor of the party opposing a motion for summary judgment. Rather, the judge is free to arrive at the most probable inferences to be drawn from uncontroverted evidentiary facts.²

Further, the non-moving party must submit more than just conclusory assertions in response to a motion for summary judgment. In other words, "[a] mere scintilla of evidence or only slight doubt is not sufficient to create a genuine issue of material fact."³

B. BLRID's and Schureman's objections relative to diversion volume limitations remain barred by *res judicata* and/or collateral estoppel because these elements of the above subcases remain unchanged from the initial partial decrees of the above subcases, and were not objected to previously.

¹Idaho Rule of Civil Procedure 56(c).

²*Loomis v. City of Hailey*, 119 Idaho 434, 437, 807 P.2d 1272, 1275 (1991); *Blackmon v. Zufelt*, 108 Idaho 469, 470, 700 P.2d 91, 92 (Ct. App. 1985) (citing *Riverside Development Co. v. Ritchie*, 103 Idaho 515, 519, 650 P.2d 657, 661 (1982)).

³*Samuel v. Hepworth, Nungester & Lezamiz, Inc.*, 134 Idaho 84, 87, 996 P.2d 303, 306 (2000).

As set forth above, Schureman objected to the volume quantity and place of use descriptions of the above-subcases contained the *Amended Director's Report*, yet the combined volume quantity and place of use elements of these subcases did not change in the *Amended Director's Report* from the prior partial decrees. A copy of the original partial decree for Water Right No. 34-2459 and the amended partial decree for the same water right are attached to the *Second Harris Affidavit* at Exhibits B and E respectively.

Schureman had the opportunity to object to these elements prior to the issuance of the original partial decrees, but did not. Therefore, Isom maintains that the objections now filed to the *Amended Director's Report* for these water rights as to the unchanged elements amount to a second bite at the apple, which should not be permitted pursuant to the doctrine of *res judicata* and/or collateral estoppel.

In response to this argument, Schureman argues that this Court "specifically ruled that objections could be filed in the Order on Motion to Set Aside Partial Decree," and that Idaho Code § 42-1412 provides Schureman an opportunity to file an objection to the Director's report. Objector's Response at 7. Additionally, Schureman argues that "Isom sought to have the prior decrees set aside. He cannot hide from the consequences of that decision." *Id.*

It is true that Isom sought to have the partial decrees for the above subcases set aside, but only to remedy the omission of the Island Wells from those decrees. To the extent of these changes, Schureman can certainly object to the inclusion of the Island Wells, which he has done. However, Schureman has also objected to the volume limitation of 8441.5 acre-feet and the place of use of the water rights, both of which are elements that remains unchanged from the prior partial decree. It is these elements of the above subcases which we argue Schureman is barred by *res judicata* to now raise. Schureman focuses on whether the Island Well issue is barred by *res judicata* in his briefing,

and as we have previously stated, this changed element is open for new objection, and is not barred by *res judicata*.

However, Schureman does not address the volume limit or place of use issues in his section of the *Objector's Response* addressing the *res judicata* argument, but instead argues that Isom is making a collateral attack against the license in this matter. This argument is addressed below, but to the extent the volume issue and place of use elements are subject to *res judicata*, Schureman provides no rebuttal. Therefore, it seems clear that this unchanged element of the water right from the prior partial decrees are not subject to a new objection period, and Schureman's objections in this regard should be decided as a matter of law.

C. Schureman's request for an injury analysis remand to IDWR is not a mandate under Idaho law.

As part of Schureman's objection, they request that an injury analysis be performed by IDWR relative to the accomplished transfer pursuant to Idaho Code § 42-1425(2)(a). Isom submits that as a matter of law, such an analysis should not be undertaken.

As explained in prior briefing, counsel for Isom was involved with another set of subcases in Basin 74 (the Carmen Creek subcases) before Special Master Dolan, and requested a similar injury analysis from IDWR. The request was objected to by Barker, Rosholt & Simpson, counsel for the opposing water users. Ultimately, the request was denied, and Special Master Dolan reasoned that "[a] remand of the subcases to the Director would give the Burnses two "bites at the apple" and allow them to gather more information plus better prepare for eventual trial. But there is no doubt that a remand would delay final resolution when nothing in I.C. § 42-1425(2)(a) 'mandates' such process. . . In these subcases, there is conflicting evidence that can be determined only through a full trial and there is no suggestion that the Director is the proper trier of such qualifying fact." *Second*

Harris Affidavit at Exhibit H. Special Master Dolan went further to state that “IDWR determined that there was a transfer—presumably without injury to other water rights or enlargement of the original right—and now the SRBA Court will examine all the facts . . .” *Id.* Thus, based on this precedent, an injury analysis at this stage as requested by Schureman is neither mandatory or appropriate.

Schureman argues that the language of Idaho Code § 42-1425 is mandatory and clear and a remand must be made, which is directly contrary to Special Master Dolan’s decision. Schureman relies upon isolated language from an *Order on Summary Judgment* involving City of Pocatello subcases 29-271 et al made by this Special Master, Brigitte Bilyeu. Further review of this decision demonstrates that a remand to IDWR for these Basin 34 subcases is not appropriate. The entirety of this Special Master’s Decision is as follows:

It is interesting to note that parties to the SRBA have not previously requested a formal “remand” to IDWR because IDWR regularly receives additional information from parties during the litigation process and supplements or amends its recommendations when necessary. Parties may provide additional information to IDWR, and IDWR may consider that information without a formal remand.

However duplicative a formal remand may be, it is provided for when an objection is filed relating to I.C. § 42-1425. Here an objection was filed that relates to the accomplished transfer portion of the claim. To the extent Pocatello seeks a form remand to IDWR, the motion is **granted**. These subcases are “remanded” to IDWR, with the Special Master retaining concurrent jurisdiction. **The remand will consist of additional information or evidence being presented to IDWR. After IDWR considers the additional information, its conclusions may be reported in an Amended Director’s Report or a Supplemental 706 Report. The Amended Director’s Report should contain explanatory material stating the basis for its recommendation and should address injury to existing water rights. To be clear, the remand is not intended to be a separate administrative transfer proceeding, but is to be part of the record for this case.**

Order on Summary Judgment, Aug. 18, 2006, at 5-6 (underline and bold emphasis added). The underlined and bolded language of this decision is important, because it demonstrates that this

decision is not inconsistent with Special Master Dolan's decision wherein he stated that "nothing in I.C. § 42-1425(2)(a) 'mandates' such a process."

First, the Pocatello decision makes it clear that the "remand" is not an administrative process, but the opportunity to provide additional information to IDWR. This "remand" has already been done in the above subcases when the remand was made to IDWR to issue an *Amended Director's Report*, and an injury analysis has likewise been done as a result of this remand. The *Amended Director's Report* did contain not only explanatory material addressing injury, but a condition of the water right that subordinates the Island Wells in a delivery call situation with this condition:

Pursuant to a call, in times of scarcity, the diversion of water under this right from the two wells in T05N R26E S34 SENWSW and T04N R25E S3 NESENW has a priority date of May 18, 1982.

This condition was added to address injury to other water rights. It is not typical for IDWR to subordinate accomplished transfers as a matter of course in their reporting of water rights recommendations. The added condition is therefore a product of the very injury analysis Schureman seeks, and a remand at this point would indeed be duplicative and unnecessary. To extent injury occurs in the future as the result of a delivery call, existing water rights are protected, including those of Schureman.

Based upon Isom's counsel's review of all of the Objectors' ground water rights contained on IDWR's website, they are all senior to the May 18, 1982 subordination. Therefore, the protection that has already been provided by IDWR protects the Objector's ground water rights. There is nothing more that IDWR could do to protect them.

In short, as a matter of law, no injury analysis needs to be performed based on existing SRBA precedent, and furthermore, the inclusion of the above language provides Schureman with the all of the injury protection the Department can provide in the context of the SRBA. For these reasons, this

portion of Schureman's objection should be addressed as a matter of law, with an order of summary judgment in favor of Isom on this issue.

D. Matters relative to a ground water calls are properly addressed through administrative procedures, not the SRBA.

Schureman next argues that the subordination condition that makes the Island Wells subordinate to all of the Objector's water rights does not provide injury protection and that Isom's claim "is wrong and demonstrates a misunderstanding of the procedure for a ground water call." Objector's Response at 9. Schureman then discusses various provisions of the Ground Water Act, and the establishment of reasonable ground water pumping levels, which means that "junior ground water rights are free to deplete the source while those diverting under senior ground water rights must continue to suffer the consequences of depletions that require deeper eliminate the water supply." Objector's Response at 10. Schureman then makes a claim that "[u]nder the law, therefore, Schureman will have no recourse when Isom's diversions deplete the water supply."

These claims are rather remarkable, as they suggest that the Isom's Amended Partial Decrees are somehow isolated from the prior appropriation doctrine. This is simply not the case. There is no language to this effect in the *Amended Director's Report*.

The arguments now raised by the Objectors may trigger memories of the same arguments made to this Special Master in 1999 regarding another set of subcases owned by Everett T. Acor, Jr. The Special Master in this case has already dealt with arguments from the Big Lost Basin relative to accomplished transfers, enlargements and conjunctive management in a decision entitled *Special Master's Report and Recommendation, Findings of Fact and Conclusions of Law for Water Rights 34-256, 34-416, 34-618, 34-692C, 34-2330B, 34-2426C, 34-7080B, 34-7092, 34-7121A, 34-7121B, 34-7179, 34-10896, and 34-12376*, (hereinafter, "SRBA Decision").

The Special Master addressed objections to water rights on the basis that use of ground water pumped further up the Lost River Valley has injured senior water rights, and will do so in the future. The first argument advanced by the objectors was that the court should “reject changes in place of use for rights which were transferred to an area known as Era Flat. The Association claimed that allowing rights to be used at this new place injured existing rights.” SRBA Decision at 2-3.

Regarding this argument, this Special Master held that these objections were not sound in the adjudication proceeding, and then thoroughly discussed the mechanics of the prior appropriation doctrine. Ultimately, this Special Master found that “[t]he proper application of the prior appropriation doctrine should protect the senior water rights in the Big Lost River Valley. Consequently, the injury alleged by The Association is not the kind of injury which should defeat the changes in use which occurred, since senior users could enforce the prior appropriation doctrine.” SRBA Decision at 9 (emphasis added). Furthermore, “[u]nder the prior appropriation doctrine, these senior rights are superior in times of shortage to the rights to which The Association objected. The court presumes that the junior rights could be shut off in times of drought. Therefore, it follows that no injury has occurred.” *Id.* at 10 (emphasis added).

With regards to allegations of injury for the movement of water to the Era Flat, or “out of the valley” as it is sometimes referred to, the court held that “[f]or those water rights which involved a change in place of use, The Association must show that the change resulted in injury to water rights existing at the time of the change. There is insufficient evidence to show these changes in place of use to Era Flat resulted in injury of existing rights.” SRBA Decision at 10.

Clearly matters of water rights administration are available to Schureman, and there is no suggestion or condition that exempts Isom from prior appropriation doctrine. The prior

appropriation doctrine is alive and well, and is currently being enforced in various delivery calls throughout the Eastern Snake Plain Aquifer.

Additionally, Schureman alleges that condition providing for advancement of the 1982 priority date “is no protection at all.” Objector’s Response at 10. This argument was also addressed by this Special Master in the SRBA Decision. In discussing advancement of priority dates for water right enlargements, this Special Master specifically discussed the protection afforded with a priority date advancement in light of the Idaho Supreme Court case of *Fremont-Madison Irrigation Dist. v. Idaho Ground Water Appropriators*, 129 Idaho 454, 926 P.2d 1301 (1996). In that case, the court held that “[t]he provision for advancement of the priority date is adequate protection to junior appropriators.” *Id.* In discussing this case, this Special Master then held:

The analysis conducted by IDWR recognizing that an expansion occurred, together with the advancement of priority recommended, convinces the court that IDWR conducted a proper analysis of these rights under I.C. § 42-1426. The Association has the burden of proving that the existing rights were injured by the change from supplemental to primary in light of the advancement of priority. The court finds there was insufficient evidence to show that the change from supplemental to primary caused injury to senior rights once the priority was advanced.

SRBA Decision at 11-12.

Thus, advancement of a priority date is the very tool which does protect against injury, and it is the very tool used by IDWR in the above subcases. This protection and the property application of the prior appropriation doctrine, which is the law in Idaho, will protect Schureman in the event that their senior water rights are impacted by the junior Island Wells. There is no need for a remand to determine injury.

- E. Isom has shown that 1000 inches (20 cfs) of water was diverted from the Island Wells before 1987, and the documents provided by Schureman lend further support to IDWR’s Amended Director’s Report in this regard.**

In response to the evidence presented by Isom, Schureman includes a number of transport agreements from Crater Farms and claims that "none of the pre-1987 delivery conveyance agreements include the island wells as authorized points of diversion." Objector's Response at 11. A careful review of these documents demonstrates that the legal descriptions contained in these documents are likely place of use descriptions, and are not very instructive. What is helpful is the repeated reference to "well waters" in these agreements of 1000 inches, or 20 cfs. Clearly this reference is to the Island Wells, which were in the process of being developed beginning in 1974. In fact, the 1980 transport agreement (Exhibit D to Arrington Aff) is particularly helpful, in that it once again specifies 1000 inches of "pump water", with the end result being 800 inches at the head of the Munsey Canal (which is the Arco diversion). The description of the canal listing "Munsey" also contained two asterisks, that reference below it the "island, eastside, arco to munsey." This transport agreement was also for a twenty (20) year term, which would have spanned the 1980 to 1987 time period within which the full Island system could be developed. The second well was drilled in 1982, and this 1980 transport agreement shows that Willard Bell was planning for the diversion of 20 cfs to his place of use.

Furthermore, Exhibit H to the Arrington Affidavit provides additional support for this arrangement. Mr. Lundy specifically states that "in the minutes of 1981, you were given permission to use the agreement for the Island, eastside, Arco and Munsey Canal, whereas the Transport Agreement only lists the Island and Munsey." This provides further support for the use of the BLRID's system to divert 1000 inches of "well" or "pump" water.

Additionally, attached at Exhibit B to the *Third Harris Affidavit* is a letter from David Shaw of ERO to Ernest Carlsen regarding his review of power records in the mid-1980s. Mr. Shaw states that "[t]he peak use of the airport wells occurred in May and the peak use of the island wells was in

July and August. The island wells continued to be used later in the season than the airport wells, apparently as the airport well supply diminished.” This is consistent with the position advanced by Isoms, where they used the closer Airport Wells early in the season, and then relied upon the Island wells later in the season when the Airport Wells did not produce as well.

Lastly, the license of Water Right 34-7037 shows a diversion capacity of 24.66 cfs on the face of the license, and on that basis (gathered from the August 1985 field exam), licensed Water Right 34-7037 for 12 cfs. This licensing only addressed 34-7037, and not the historic use of the other water rights from the Island Wells. Schureman argues that Isom is attempting to collaterally attack the license, but it is Schureman that is doing so by attacking the plain language of this license which describes the system capacity of the Island Wells to be 24.66 cfs. The 1990 follow up examination is not clear on its face exactly what was measured, and it is clear that IDWR relied upon the earlier 1985 field examination in its determination of the capacity of the Island Wells.

Based on the evidence contained in the Isom Affidavit, the license of Water Right No. 34-7037, and the BLRID transport agreements (both those provided by Isom and provided by Schureman) demonstrate that it is undisputed that the accomplished transfer occurred. In short, all of the evidence set forth above and in prior pleadings demonstrates that the accomplished transfer finding is based upon actual historic use. We should note that Isom’s would clearly agree to a maximum diversion limit of 20 cfs (1000 inches) for the Island Wells under all of its water rights (not 24.66 as the partial decrees could currently be read to allow for) based on the transport agreements provided by Schureman and the current diversion capacity of the Island Wells, which is 20 cfs. This would further limit the right, in addition to its subordinated priority date.

Summary judgment on this issue is therefore appropriate as there is no dispute of fact on these issues.

- F. To the extent the volume limitation element remains subject to a second bite of the apple, it is undisputed that the volume remains the same as the prior partial decree, which was apparently calculated by adding additional volume to the licensed diversion volume to allow for conveyance losses through the BLRID canal system.**

It is undisputed that IDWR licensed the above subcases such that in combination, they are allowed 3.5 acre-feet per acre—based on an IDWR standard—for a total of 6930 acre-feet. The original and amended partial decrees have increased this amount to 8441.5 acre-feet to account for the conveyance losses suffered by Isom through the BLRID system, which is used for approximately 8 miles before reaching Isom's place of use. See *Harris Affidavit* at Exhibit I (showing location of Island wells and Isom place of use). Per acre, this means that the Isom's have been allocated approximately 4.26 acre-feet per acre, a reasonable amount given the over 8-mile trip the Isom water must make through the BLRID system before arriving at the authorized place of use.

Schureman claims that the license for these rights only allows for 6930 acre-feet, and that this should be the limit on the Amended Partial Decrees. As set forth above, the inclusion of the 8441.5 acre-feet limitation was not objected to previously, and objections at this point are barred by *res judicata*. However, even if the issue is properly raised, the addition of conveyance losses is appropriate in this instance. The 3.5 acre-foot standard contained in the license is the amount of water needed at the place of use. In order to get this water there, an additional .76 acre-feet is needed, and it is entirely appropriate for the Department to include the additional conveyance loss amounts. As this court has certainly observed, IDWR's standards and conditions evolve over time, and the inclusion of the conveyance loss amounts as a total of 8441.5 acre-feet may not have been included in the license, but the reference to 3.5 acre-feet at the place of use was. Given this discrepancy, which could be viewed as an inconsistency, it is appropriate for IDWR to remedy the inconsistency in the license with the partial decree.

Schureman argues that we are trying to “collaterally attack” the license, yet we are not the ones who have objected to the volume limitation recommended by IDWR. We simply agree with their inclusion of conveyance losses in their volumetric limitation. This does not amount to a collateral attack.

In sum, conveyance losses are a consideration made by IDWR in their SRBA recommendations when determining appropriate rates and volume allocations. For this reason, summary judgment in Isom’s favor is appropriate.

G. The Rity Lundy letter did not limit the 1000 inches of “well water” or “pump water.”

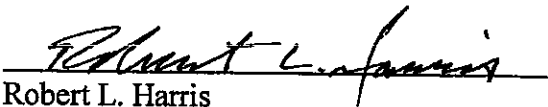
Schureman lastly argues that the letter attached as Exhibit H from Rita Lundy demonstrates that the 1000 inches in the prior transport agreements included a surface water amount of 800 inches within the 1000 inches. This claim, however, is contrary to the clear references to “well water” and “pump water” in the transport agreements. Also, a careful reading of the letter indicates that Ms. Lundy was attempting to add “another” 800 inches, for a total of 1800 inches that could be carried through the BLRID system. In short, this letter does not establish that the 1000 inches included 800 inches of surface water as claimed by Schureman. At best, the letter provides for another 800 inches of surface water, and to the extent that there is any ambiguity, the plain language of the transport agreements should control.

III. CONCLUSION

For the reasons set forth above, summary judgment in favor of Isom as to Schureman’s objections should be granted. As a practical matter, Schureman is protected from injury through the prior appropriation doctrine, and the objections filed by them appear to be resurrected argument

made ten years ago before this Special Master. These are issues that have been previously decided, and these subcases can therefore be resolved as a matter of law.

Dated this 24th day of November, 2010.


Robert L. Harris
HOLDEN, KIDWELL, HAHN & CRAPO, PLLC

CERTIFICATE OF MAILING

I certify that on this 20th day of November, 2010, I mailed the original and copies of this form, including all attachments, to the following persons by mailing the original and/or copies, postage prepaid and addressed as follows:

1. Original to:

Clerk of the District Court
Snake River Basin Adjudication
253 Third Avenue North
P.O. Box 2707
Twin Falls, ID 83303-2707

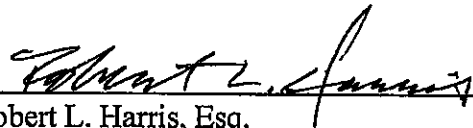
2. Copies to:

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